IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

MONDAY, THE 15TH OCTOBER 2007 / 23RD ASWINA 1929

WP(C).No. 15291 of 2007(U)

PETITIONER:

C.P. SALEENA,
H.S.A. (ARABIC), M.S.P. HIGHER SECONDARY SCHOOL,
MALAPPURAM.

BY ADV. SRI.P.K.VIJAYAMOHANAN
SMT.RESMI G. NAIR

RESPONDENTS:

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1. THE STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
GENERAL EDUCATION DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM.

2. THE DIRECTOR OF PUBLIC INSTRUCTION,
THIRUVANANTHAPURAM.

3. THE DISTRICT EDUCATIONAL OFFICER,
MALAPPURAM.

4. THE MANAGER,
M.S.P. HIGHER SECONDARY SCHOOL, OFFICE OF THE
COMMANDANT, MALABAR SPECIAL POLICE, MALAPPURAM.

5. SMT. K.R.BEEGAM, W/O. ABOO SALIH,
KUZHIKKAD HOUSE, ATHANIKKAL POST, VALLUVAMBRAM,
MALAPPURAM DISTRICT.

BY ADV. SRI.K.A.MANZOOR ALI
GOVERNMENT PLEADER SMT. REMANI T.B.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 15/10/2007,
ALONG WITH WPC NO. 19236 OF 2007 WPC NO. 21229 OF 2007 WPC NO. 18738 OF 2007
THE COURT ON 15/10/2007 DELIVERED THE FOLLOWING:

W.P.(C)NO.15291 OF 2007

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1: COPY OF ORDER NO.EM 2/61457/01/DPI/K.DIS. DATED 14.1.2002 OF THE 2ND RESPONDENT.

EXT.P2: COPY OF THE APPOINTMENT ORDER DATED 15.7.2006 ISSUED BY THE 4TH RESPONDENT IN FAVOUR OF THE PETITIONER.

EXT.P3: COPY OF COMMUNICATION NO.22243/J2/06/G.EDN. DATED 26.7.2006 OF THE GOVERNMENT TO THE 3RD RESPONDENT.

EXT.P4: COPY OF THE ORDER NO.K.DIS./B2/35152/06 DATED 27.1.2007 OF THE DEPUTY DIRECTOR OF EDUCATION, MALAPPURAM.

EXT.P5: COPY OF THE ORDER NO,K.DIS/B2/35152/06 DATED 27.1.2007 OF THE DEPUTY DIRECTOR OF EDUCATION, MALAPPURAM.

EXT.P6: COPY OF THE REVISION PETITION DATED 16.2.2007 FILED BY THE PETITIONER BEFORE THE 2ND REPONDENT AGAISNT EXT.P5 ORDER OF THE DEPUTY DIRECTOR OF EDUCATION.

EXT.P7: COPY OF THE COMMUNICATION NO.72199/S2/06/G.EDN. DATED 15.1.2007 OF THE 1ST RESPONDENT FOR PERSONAL HEARING ON 8.2.2007.

EEXT.P8: COPY OF THE NOTES OF ARGUMENT DATED 8.2.2007 SUBMITTED BY THE PETITIONER BEFORE THE GOVERNMENT.

EXT.P9: COPY OF THE GOVERNMENT ORDER G.O.(RT)NO.1026/07/G.EDN. DATED 7.3.2007

EXT.P10: COPY OF THE COMMUNICATION NO.72199/S2/06/G.EDN. DATED 13.3.2007 FOR THE PERSONAL HEARING ON 22.3.2007.

EXT.P11: COPY OF THE NOTIES OF ARGUMENT SUBMITTED BY THE PETITIONER BEFORE THE GOVERNMENT ON 22.3.2007.

EXT.P12: COPY OF COMMUNICATION NO.72199/S2/06/G.EDN. DATED 4.5.2007 OF THE 1ST RESPONDENT TO RESPONDENTS 3 AND 4 WITH COPY TO THE PETITIONER.

5TH RESPONDENT'S EXHIBITS

EXT.R5(A): COPY OF APPOINTMENT AND ORDER OF APPROVAL PASSED BY THE 3RD RESPONDENT DATED 17.4.2002.

EXT.R5(B): COPY OF G.O.(P)NO.187/05 DATED 17.6.2005.

TRUE COPY

PA TO JUDGE.

S. SIRI JAGAN, J.

W.P.(C)Nos.15291,18738,19236 & 21229 OF 2007

Dated this the 15th day of October, 2007

JUDGMENT

All these four writ petitions hinges on the question as to whether Smt. K.R. Beegum, the petitioner in W.P.(c)No.21229/07 is entitled to preferential appointment under Rule 51A of Chapter XIVA of the Kerala Education Rules, in a vacancy which arose on 15.7.2005 in recognition of her earlier approved service for 112 days between 28.6.2000 to 17.10.2000, in a maternity leave vacancy in the post of HSA (Arabic). The question arises on account of the introduction of the first proviso to Rule 51A by amending Rule 51A, by G.O.(P)No.121/05/G.Edn. dated 16.4.2005 published in the Gazette dated 27.4.2005, by which for claiming preferential right of appointment under Rule 51A a minimum continuous service of one academic year as on the date of relief pursuant to the prior service was made compulsory.

2. The brief facts necessary for disposal of these writ petitions may be stated as under.

3. Smt. K.R. Beegum was initially appointed as HSA (Arabic) in the M.S.P. H.S.S., Malappuram for the period from 28.6.2000 to 17.10.2000 against a maternity leave vacancy. Although initially the appointment was not approved, the Director of Public Instructions as per order dated 14.1.2002 directed the D.E.O., Malappuram to approve the appointment of Smt. Beegum on condition that Smt. C.P. Saleena, the petitioner in W.P.(c)No.15291/07, a Rule 43 claimant working in the U.P. Section of the school, be given promotion as HSA in the next arising vacancy. Accordingly, the appointment of the petitioner was approved by the D.E.O., Malappuram as per order dated 17.4.2002. As a result, Smt. K.R. Beegum became eligible for preferential appointment under Rule 51A of Chapter XIVA of the Kerala Service Rules in subsequent vacancies, as per the rules obtaining at that time.

4. Later, a vacancy of HSA (Arabic) arose in the school on 15.7.2005. Smt. Beegum staked claim for appointment to the said post in recognition of her claim for preferential appointment under Rule 51A. In the meantime, Rule 51A had been amended by Government Order published in the Gazette dated 27.4.2005. By another amendment to Rule 43 by G.O.

(P)No.187/05/G.Edn. dated 17.6.2005 published in the Gazette dated 25.6.2005, claim under Rule 43 was made subject to Rule 51A. The Manager of the school, who is the petitioner in W.P.(c)No.19236/07, promoted Smt. C.P. Saleena to the vacancy which arose on 15.7.2005. This was challenged by Smt. Beegum. Against the act of the Manager in promoting Smt. C.P. Saleena, Smt. Beegum filed W.P.(c)No.9792/06 before this Court and by judgment dated 31.3.2006, this Court directed the Manager to consider and pass orders on the petition filed by her. Pursuant thereto, the Manager passed Ext.P3 order rejecting the claim of Smt. Beegum. Smt. Beegum again filed W.P.(c)No. 22647/06 before this Court. At that time the matter was also pending before the Government in revision. This Court by Ext.P4 judgment directed the Government to consider and dispose of the revision petition after hearing all parties. Pursuant thereto, Ext.P6 order was passed by the Government upholding the claim of Smt. Beegum for preferential appointment in the vacancy in recognition of her claim under Rule 51A. Accordingly, the Manager was directed to appoint Smt. Beegum in the post of HSA(Arabic) which arose in the school

on 15.7.2005. In W.P.(c) Nos.19236/07 and 15291/07 the Manager of the school and Smt. C.P. Saleena are challenging the order of the Government. In W.P.(C)No.21229/07 Smt. Beegum seeks a direction to the Manager to appoint the petitioner in the existing vacancy of UPSA in the school for which Ext.P4 advertisement was issued by the Manager for selection and appointment. In the same, she also sought a direction to the 3rd respondent not to make further appointments of any teaching staff in the school until the petitioner is appointed in any of the categories for which the petitioner has a right of appointment in recognition of her right under Rule 51A.

5. W.P.(c)No.18738/07 is filed by another teacher namely, Smt. V.P. Rukhiya challenging the letter dated 26.7.2006 from the Government to the DEO, Malappuram informing that claim under Rule 51A would prevail over the claim under Rule 43 and therefore the right of Smt. K.R. Beegum has to be considered before considering the claim of a Rule 43 claimant, as also Ext.P11 order which is the order challenged by the Manager and Smt. C.P. Saleena in their writ petitions. There is also a prayer to the Manager to revise

Ext.P6 order of the District Educational Officer to restore one post of LPSA (Arabic) reduced for the year 2006-2007 applying the teacher student ratio of 1:40 to retain the petitioner in that post.

6. As I have stated at the beginning, the disposal of these writ petitions hinges on the question as to whether Smt. Beegum is entitled to claim preference in appointment under Rule 51A of Chapter XIVA of the Kerala Education Rules. Rule 51A of Chapter XIVA reads thus:

> "[51A. Qualified teachers who are relieved as per Rule 49 or 52 on account of termination of vacancies shall have preference for appointment to future vacancies [in the same or higher or lower category of teaching posts, for which he is qualified, that may arise] in schools under the same Educational Agency [or an Educational Agency to which the school may be subsequently transferred] provided that they have not been appointed in permanent vacancies in schools under any other Educational Agency.
>
> ["Provided that a teacher who was relived under rule 49 or rule 52 shall not be entitled to preference for appointment under this rule unless such teacher has a minimum continues service of one academic year as on the date of relief.
>
> Provided further that the first preference under this rule shall be given to

protected teachers"]."

[**Note 1**:- If there are more than one claimant under this rule the order of preference shall be according to the date of first appointment. If the date of first appointment is the same, then preference shall be decided with reference to age, the older being given first preference. In making such appointments, due regard should be given to the [requirement of subjects and to the instructions issued by the Director under sub-rule (4) of rule 1] as far as High Schools are concerned].

["**Note 1A-** Fresh appointments to vacancies arising in the same or higher or lower category of teaching posts under the Educational Agency shall be made only after providing re-appointment to such teachers thrown out from service and protected teachers available under the Educational Agency.

Explanation:- For the purpose of this clause."Protected teacher" means, a teacher who has been retrenched for want of vacancy after putting such length of regular service that may be specified by the Government or who is eligible for such Protection as per G.O. (Ms.)No.104/69/Edn. Dated 6.3.1969 or G.O. (Ms.)No.231/84/G.Edn. dated 27.10.1984 or any other orders issued by Government from time to time."]

[**Note 2:-** Manager should issue an order of appointment to the teacher by Registered post acknowledgment due and give a period of 14 (fourteen) clear days to the teacher to join duty. If the teacher does not join duty

> in time the Manger should give a further notice to the teacher stating that another person would be appointed instead and that the preferential right under this rule would be forfeited if not exercised within another 7 (seven) clear days. If nothing is heard during that time also, the preferential right under the rule will be regarded as forfeited]"

7. The first proviso to the Rule was added by Government order dated 16.4.2005 published in the Gazette on 27.4.2005. The vacancy which is the subject matter of this writ petition arose on 15.7.2005 that is after the addition of the first proviso to Rule 51A.

8. The contention of the Manager and other two teachers is that Smt. Beegum is not entitled to preference under Rule 51A, since she does not have the minimum continuous service of one academic year during her earlier service which is a condition for claiming right under the Rule as per the 1st proviso thereof. They would submit that vacancies which arose after the introduction of this proviso, can be filled up only subject to the above minimum service condition prescribed in the proviso which according to them, Smt. Beegum does not have.

9. Smt. Beegum had service for the period from

28.6.2000 to 17.10.2000 in a maternity leave vacancy. The said service was for a period of 112 days only. Therefore, it is an admitted fact that Smt. Begum does not have the minimum continuous service of one academic year during her previous service. Then the question is whether the proviso would apply to Smt. Beegum.

10. The contention of Smt. Beegum is that, that the said proviso would be applicable only to those teachers, who were relieved as per Rules 49 or 52 and not to teachers whose services were terminated on account of termination of vacancies mentioned in the main rule, to whom also the benefit under Rule 51A has been conferred. This contention is raised in view of the absence of the words "on account of termination of vacancies" in the proviso whereas in the main part of the Rule, benefit under Rule 51A is granted to teachers who are relieved as per Rule 49 or 52 or on account of termination of vacancies. The argument is that the proviso would be applicable only to those teachers who are relieved as per Rules 49 or 52 and not to teachers, who were relieved on account of termination of vacancies.

11. At first blush, the argument sounds attractive. But

on a deeper probe into it, I am not satisfied that, that argument would pass muster. Rule 52 is not relevant for our purpose because that relates to teachers who were relieved on account of reduction in the number of posts under orders of the Department, which is not the case here. Rule 49 of Chapter XIVA reads thus:

> 49."[Qualified teachers except Headmasters appointed in vacancies which are not permanent] which extend over the summer vacation and who continue in such vacancies till the closing date shall be retained in the vacancies during the vacation, if their continuous service as on the closing day is not less than eight months. The teachers so retained shall be entitled to the vacation salary. These teachers shall be relieved on the closing day if their continuous service as on that day is less than the aforesaid period. This rule shall not apply to teacher appointed in training vacancies]."

Rule 49 relates to teachers appointed in vacancies which are not permanent which extend over to the summer vacation and who continue in such vacancies till the closing date whose continuous service on the closing day is not less than eight months. The Rule says that such teachers would be relieved on the closing day if their continuous service as on that day is

less than eight months whereas they would be entitled to vacation salary also, if as on the date of closure of the school the continuous service is not less than eight months and the vacancy extends over the summer vacation.

12. According to me, there is no qualitative difference between the termination of the service of the teachers mentioned in Rule 49 and other terminations of service. Termination under Rule 49 and the termination involved in this case are on account of termination of the vacancies to which they were appointed. In fact the teachers mentioned in Rule 49 stands on a higher pedestal than teachers whose services were terminated otherwise than under conditions stipulate in Rule 49. The necessity to enact Rule 49 arose only because provision had to be made for termination of service of teachers on the closing day of the school. One cannot hold that while providing for such contingency the rule maker intended that the teachers whose date of termination of service falls prior to the closing date of the school would be entitled to a better claim than teachers who are mentioned in Rule 49. In fact, if the contention of Smt. Beegum to that effect is accepted a person who had put in more service than her and who is

entitled to even vacation salary by virtue of Rule 49, would be deprived of the benefit of Rule 51A, whereas a teacher who had put in just sixty days of service would become entitled to preferential claim under Rule 51A, which cannot, by any stretch of imagination, be the object in adding the first proviso to Rule 51A. If at all, the absence of the words "on account of termination of vacancies" in the proviso would only be an inadvertent omission while drafting the amendment of the rule. I have no doubt in my mind that the proviso applies to all the teachers mentioned in the main part of the Rule 51A. A different interpretation would lead to anomalous results not intended by the Rule. In that view, Smt. Beegum would not be entitled to claim appointment under Rule 51A, since the vacancy arose subsequent to the date of introduction of the proviso in the Rule, namely 15.7.2005.

13. The learned Government pleader made a valiant effort to support the impugned order by an argument which is not mentioned either in the impugned order or in the counter affidavit filed by the Government. The Counsel for Smt. Beegum also does not subscribe to that contention. This contention is to the effect that a right has already accrued

to Smt. Beegum even prior to the introduction of the proviso which cannot be taken away by an amendment to Rule 51A. According to the learned Government pleader since that right accrued prior to introduction of the proviso, that right would be there, notwithstanding the introduction of the proviso and therefore Smt. Beegum has to be given preference in appointment to any vacancy which arose after the right under the unamended Rule 51A accrued to her. This contention is based on the position of law that vested right cannot be deprived by retrospective amendment of the law. I am unable to accept this contention also. True, the first proviso to Rule 51A has not been made retrospective. But I am of opinion that such right would be available to such teachers only for appointment to vacancies which arose prior to the date of addition of the proviso and not thereafter. The right under Rule 51A crystallises only when the vacancy arises. It is settled law that law as obtaining on the date of occurrence of the vacancy is the one to be applied for filling up the vacancy. Therefore when considering the right to appointment to a vacancy which arose subsequent to addition of the proviso, the right of the teachers should be considered on the basis of the

amended provisions of Rule 51A. After addition of the proviso, the fact that before addition of the proviso Smt. Beegum had a right under the unamended Rule 51A, is of no significance, since the vacancy which arises subsequent to the introduction of the proviso in Rule 51A can be filled up only in accordance with the amended provision. The right under Rule 51A is not an absolute right, it is only a preference. That preference cannot be equated to a right accrued. That can only be a right to preference in appointment if all other conditions for claiming such preference as on the date when that right of preference is to be exercised. The occasion for exercising that right arises only on the date of occurrence of vacancy. Therefore the preferential right crystallises only when the vacancy arises. In this connection it would be apposite to refer to the scope of Rule 51A as explained by the Full Bench in **Manager, Trikkur Panchayat Sarvodaya H.S. V. Suma [2003 (2) KLT 65 (F.B.)].** The Full Bench said thus in paragraph 17 to 19.

> "17. In its ordinary sense,'preference' implies a priority. A favoured treatment. If a retrenched teacher competes with another from the open market and both are found to be equal in merit, the retrenched employee may be preferred to the other. Thus, the person is given priority and shown a favour. It does not,

however, mean reservation. Preference should not imply the exclusion of all the other candidates irrespective of their merit.

18. It deserves mention that under our Constitution, every citizen is entitled to an equality of opportunity in the matter of employment. In the case of aided schools, and especially those maintained out of the State funds by statutory bodies, the guarantee under Art.16 cannot be violated. The rule of equality shall be clearly infringed if a person who has merely worked in a leave vacancy for a short time as envisaged under R.49 is appointed without even considering the claim of a more meritorious candidate despite the fact the latter has better qualifications and a higher merit. A short stint of service against a leave or any other temporary vacancy, which may have occurred on account of the suspension of the original incumbent, cannot overshadow the rights and merit of all else.

19. It was contended on behalf of the teachers that the Rule has been consistently interpreted to mean that a retrenched employee shall be appointed to the exclusion of all others. It may be so. However, it appears that such a liberal construction of R.51A may attract the criticism of its being violative of Arts.14 and 16 of the Constitution. I am of the opinion that the Rule envisages a limited advantage to the persons falling within its ambit. It provides for the grant of a 'weightage'. Under the rule, a person who has already served can be given a few extra marks. It lays down a rule of preference amongst equals. It does not envisage a denial of equality of opportunity to other

> qualified candidates. I think, it would be unfair to interpret the rule in such a way that it allows reservation under the grab of preference."

In holding so the Full Bench derived support from the decisions of the Supreme Court elucidating the meaning of the word 'preference' in **Yogendra Pal Singh and others V. Union of india and others [AIR 1987 SC 1015), Secretary (Health) Dept. of H&FW & another V. Dr. Anitha Puri and others [1996 (6) SCC 282).** The Supreme Court had reiterated the same view in **Secretary, A.P. Public Service Commission V. Y.V.V.R. Srinivasalu and others [(2003) 5 SCC 341) and State of U.P. V. Om Prakash [2006 (4) KLT 537]**. If what is granted under Rule 51A is only a priority in appointment, the conditions for such priority has to be reckoned as on the date of occurrence of the vacancy, which would include the conditions prescribed for claiming such preference in the rule as on the date of occurrence of vacancy.

14. While taking this view I am also influenced by the fact that with effect from 25.6.05, Rule 43 of Chapter XIVA was also amended making the right for promotion under that Rule subject to Rule 51A also, which would have the effect of

Rule 43 claim being subject to a claim under Rule 51A, nullifying the effect of decisions of this Court holding that Rule 43 claim would prevail over Rule 51A claim. If Smt. Beegum's contention that despite the addition of the proviso to the Rule, she would continue to be entitled to claim under Rule 51A, then the claim of Smt. Saleena that she is entitled to a better claim under Rule 43 despite the amendment to Rule 43 also has to be accepted. I am of the opinion that both contentions cannot be accepted since the Rule as obtaining on the date of occurrence of vacancy only can be applied since the right is crystallised only on arising of vacancy. In view of the above findings, Ext.P6 order (in W.P.(c) No.19236/07), which is the impugned order in W.P.(c) Nos.15291/07 and 18738/07 also, is unsustainable and accordingly the same is quashed.

15. The result is that as on the date of occurrence of vacancy the only person eligible to be appointed as HSA (Arabic) in the vacancy which arose on 15.7.2005 would be Smt. C.P. Saleena, who had a right to be promoted under Rule 43 of the Kerala Education Rules, Smt.Beegum being not entitled to Rule 51A claim, having no minimum continuous service of one year before being relieved on account of

termination of vacancy during her earlier tenure. Accordingly, Smt. C.P. Saleena would be entitled to the relief of promotion to the post which arose on 15.7.2005 in recognition of her right under Rule 43 of the K.E.R.

16. In view of quashing of the Government order referred to above, no further orders are necessary in W.P.(C) No.18738/07 since Smt. Beegum goes out of contention, whose right has been held as the reason for denying benefit to Smt. Rukhiya and therefore the right of Smt. V.P. Rukhiya would have to be settled accordingly. In Ext.P6 order of the DEO in (W.P.(c) No.18738/07), it is also stated that subject to the decision of the case filed by Smt. Beegum, the question of sanctioning of a post applying the teacher-student ratio of 1:40 for retaining Smt. V.P. Rukhiya would be considered later. Now that the case of Smt. Beegum has been finally decided against her in these cases, the DEO has to pass orders on that question also.

17. The Manager shall pass orders in accordance with the above directions within one month from the date of receipt of a copy of this judgment and forward the same to the DEO for approval who shall pass appropriate orders pursuant to the

same within one month from the date of receipt thereof. The DEO also shall pass orders regarding application of teacher-student ratio of 1:40 as directed above within a period of one month from the date of receipt of a copy of this judgment. If on passing such orders, there would arise a post of LPSA , the Manager shall accommodate Smt. K.R. Beegum in that post, if she is otherwise eligible.

As a consequence, W.P.(c) No.21229/07 filed by Smt. K.R. Beegum would stand dismissed.

S. SIRI JAGAN, JUDGE

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